AWANG HJ. NASSAR HJ. ABDUL JALIL

v.

BENEDICT KHOO SZE KIONG

HIGH COURT, BRUNEI
CLOUGH JA
[CIVIL APPEAL NO. 1 OF 1987]
5 DECEMBER 1987

CONTRACT: *Breach of Contract - Claim and counterclaim.*

An appeal was lodged against an order of the original Court dismissing the claim of the plaintiff and giving judgment for the defendant in a sum of $21,125 on his counterclaim against the plaintiff.

The plaintiff wished to develop his land and left it in the hands of his son Haji Ali. The defendant was one who did the same work as that of an architect. The defendant agreed to act for the plaintiff in his proposed re-development scheme for a fee of 3½% of the cost of the proposed re-development. For this fee the defendant was to submit all necessary plans for approval of the relevant authorities and was to be responsible for the administration of the building contract and supervision of construction.

In July 1984 the defendant obtained all the required approval of plans from governmental authorities and was paid in March 1985, $5,000 in advance of his fees. In May he requested a further advance of 60% of the balance of his fee which he calculated as 60% of $21,460 which was $12,876. However the plaintiff paid only a further $5,000. The evidence of Haji Ali was that the defendant had agreed with the plaintiff's proposal to pay the balance when construction began. This was denied by the defendant whose evidence the Judge preferred. The Judge also accepted the defendants evidence that he had previously enquired of Haji Ali how the plaintiff proposed to finance the project and had been told a loan from the Economic Development Board would be obtained. According to the defendants evidence which the Judge accepted, around this time the defendant had told Haji Ali that he knew of a possible source of finance and was requested by Haji Ali to help to obtain such finance it was necessary to have a feasibility report which he was willing to prepare for 1½% of the project price which he later agreed to reduce to ½% if no loan was granted. Although he had informed the plaintiff that funds were available in principle he had not informed him the finance was not guaranteed. On 24 October at the request of Haji Ali, the defendant accompanied him to the office of the EDB where an officer informed them that the project was not feasible-according to their assessment of the defendant's feasibility report. The defendant then explained his compound interest formula which the EDB accepted as feasible.

In the meantime the other loan which the defendant promised he would help obtain never materialized. However the Judge accepted the defendant's evidence that he had taken all necessary steps to get the plaintiff the loan. After several letters the plaintiff terminated the defendants contract for failure to obtain the loan. The Judge held that it was inconceivable without clear evidence that anyone performing the role of an architect would promise to ensure that a loan was furnished. In fact the letter dated 20 September 1985 specifically stipulated that the payment would by ½% if no loan materialized. The plaintiff had endorsed the letter to signify his acceptance of its terms.

Held:

[1] The allegation that the defendant had consistently represented to the plaintiff in the correspondence that he would obtain the loan is not borne out by the correspondence.

[2] The argument that since the mechanics of the loan were complicated and could not be understood by a layman such as Haji Ali and therefore his evidence should be accepted cannot be maintained.

[3] None of the matters raised by the appellant as aspects of the defendants conduct were inconsistent with the defendant's version.

[4] The Judge had not accepted as expert evidence the evidence of a non-expert but merely stated his evidence showed a "further complication" in the way of the proposed loan.

[5] The mere fact that the defendant did not reply letters referring to purported agreements to pay compensation which the defendant denies were ever made was not a factor against the defendant. No amount of self-serving letters would give rise to an agreement if it was never made. There are no grounds for disturbing the Judges decision to dismiss the plaintiff's claim.

[6] However as regards the quantum of the defendants counterclaim two matters were raised:

(a) The Judge allowed the defendant's counterclaim for 1½% of $500,000, the loan from the EDB. However the evidence of the defendant clearly indicated that the loan he was contemplating was the loan which he agreed to obtain which did not materialize. Therefore the defendant was entitled to only ½% in terms of his agreement.

(b) The second contention that an advance paid to the person through whom the loan was to be obtained should be deducted from the quantum awarded cannot be maintained as the defendant accepted the advance as agent for that other person and had paid the sum over to him.

[7] The appeal was dismissed subject to variation in quantum which was further varied after delivering oral judgment on discovery that there had been an arithmetical error in calculating the value of ½%.

Other sources referred to:
Bowstead on Agency, 15th Edn., Articles 75, 118
Halsbury's Laws of England, 4th Edn., Vol. I, para. 859

For the appellant - Dr. Norila A. Hassan
For the respondent - in person

JUDGMENT

Clough JA:

On 22 December 1986 Rhind J dismissed the claim of the plaintiff against the defendant in these proceedings and gave judgment for the defendant for the sum of $21,125 on his counterclaim against the plaintiff. The plaintiff now seeks on appeal to have the order of Rhind J set aside and to obtain judgment for $52,437.88 as damages for breach of contract which he failed to recover below.

The defendant appeared in person both below and on appeal.

The dispute between the parties arose in connection with the plaintiff's scheme to re-develop a site of land which he owned at Kampong Pusar Ulak in the Brunei district. The plaintiff had engaged the services of the defendant as a consultant to promote and supervise the development. There were delays due to failure to raise the necessary finance for the development. The sequel was that plaintiff determined the engagement of the defendant and employed other agents in his place for the purposes of the development.

The plaintiff claimed a sum of $52,437.88 against the defendant as damages for breach of contract. The defendant contended that the determination of his services by the plaintiff was a wrongful repudiation of the contract made between them and counterclaimed for the sum of $21,125 in respect of fees to which he was entitled under the contract.

In a careful reserved judgment the Judge accepted the evidence of the defendant in preference to that of the plaintiff's effectively sole witness and dismissed the plaintiff's claim. Having accepted the defendant's evidence on all material matters he also allowed his counterclaim.

The background of the case in one of relative complexity. I will outline it in this judgment and indicate, where relevant, where the Judge has made findings of fact in reliance on his preference for the evidence of the defendant.

The plaintiff is 66 years of age. He left the arrangements for the development of his land in the hands of his son, Awang Haji Ali bin Haji Nassar ("Haji Ali"), who was 36 years of age at the date of the trial and was employed as chief clerk in the Education Department.

When the plaintiff decided to redevelop his land it was producing a monthly rental of $4,500 arising from 8 units in dilapidated terrace housing. His plan was to demolish the existing structure on his land and erect a four storey block comprising 6 residential flats.

The defendant does business under the name of Engineering Structures Consultant. He evidently has no qualifications but he has studied engineering in Australia and he is registered with the Municipal Board as a designer who is authorised to submit building and structural plans for the Board's approval. As the Judge put it, in practice he does the same work as an architect.

In about May 1984 the plaintiff approached the defendant through a Mr. Goh to act for him in the plaintiff's re-development scheme. Mr. Goh gave the defendant some sketch plans. About a month later the defendant met Haji Ali and the terms of the defendant's engagement were orally agreed. It was common ground on the evidence of Haji Ali and the defendant that the defendant agreed to accept a fee of 3½% of the cost of the proposed re-development.

For this fee the defendant was to submit all necessary plans for approval of the relevant authorities and he was to be responsible for the administration of the relevant building contract and the supervision of the construction.

In July 1984 the defendant submitted plans prepared by him to the Municipal Board for approval. He did all the necessary work in connection with the plaintiff's documents of title and the relevant Government departments. In March 1985 he was paid $5,000 in advance of his fees. On 12 May 1985 he sent a letter to the plaintiff demanding a further advance. This time he wanted 60% of the balance of his unpaid fees.

In his letter he set out the services rendered or to be rendered by him for a fee of 3½% of $756,000 being the estimated cost of the project. After deducting the previous advance payment of $5,000 the defendant claimed that $21,460 was outstanding and he claimed payment

of 60% of that figure, being $12,876. However, the plaintiff only paid the defendant a further advance of $5,000. This he did on 18 May 1985. The evidence of Haji Ali was that the defendant had agreed with the plaintiff's proposal to pay the balance when construction work started. This was denied by the defendant whose evidence the Judge preferred.

The defendant's demand for a substantial advance payment of his fees was made soon after the final approval of the plans of the plaintiff's proposed re-development had been received on 1 May 1985. The defendant's evidence which the Judge preferred, was that he had previously enquired of Haji Ali how the plaintiff proposed to finance the project and that Haji Ali had told him that the plaintiff hoped, as a Bumiputra, to obtain a loan from the Economic Development Board ("the EDB")

The Judge found as a fact that in February 1985 Haji Ali had submitted an application to the EDB for a loan of $500,000, which is the maximum loan obtainable from the EDB. This finding as to the date of Haji Ali's application is rightly challenged in the plaintiff's ground of appeal as being based on a misapprehension of the evidence because the uncontroverted evidence of Haji Ali was that in February 1985 he had gone to the EDB merely to enquire about the procedure for obtaining a loan. Moreover in a subsequent letter dated 4 October 1985 from the defendant to the plaintiff it was indicated that at that date the relevant application form had not been completed.

Be that as it may, it is clear that, as the Judge found, a short while either before or after the plans were approved there was further discussion between Haji Ali and the defendant about the financing of the project. It was at this time that Haji Ali told the defendant that he had no source of finance other than a hoped for loan of $500,000 from the EDB. Haji Ali admitted under cross-examination that up to this time he and the plaintiff were sounding the market for loans and that finance had been their problem.

It was at the time of this further discussion about finance that the defendant mentioned to Haji Ali that he knew of a source of finance from Europe. The crucial issue between the parties in relation to the plaintiff's claim was whether at this stage or later the defendant had contracted with the plaintiff through Haji Ali that he would actually procure the necessary finance for the project or whether he had merely undertaken to apply to the source on behalf of the plaintiff for the necessary finance. The evidence of Haji Ali was to the effect that in May 1985 the defendant had told him the work could start on the building in July (although no contractor had yet been appointed) and that the defendant himself would make arrangements for the finance of the building. Haji Ali also indicated that the defendant had advised him to give notice to quit to the tenants and that he would not have told the defendant to issue the notices to quit dated 13 May 1985 if the defendant had not told him the project was ready to start in July.

The defendant's evidence was to the effect that, when he told Haji Ali that he knew of a possible source of finance, Haji Ali had asked him to help him find such finance and the defendant had informed him that to obtain finance from such a source or from banks it was necessary to have a feasibility report to show that the project was viable. His evidence was further to the effect that he told Haji Ali he was prepared to prepare a feasibility report for a fee of 1½ percent of the project price although some architects charged up to 5 per cent. According to the defendant Haji Ali agreed to this fee for the feasibility report.

Under cross-examination the defendant admitted he had been told in about May 1985 by his source that there was no visible objection to the granting of finance subject to reports and further information. He also admitted that he had informed the plaintiff that the funds were

available in principle but he did not tell him the finance was not guaranteed. This was because there had been a request for a report which he was preparing. He also admitted that in September 1985 he had agreed to reduce his fee to ½ per cent if no loan was granted.

The Judge preferred the evidence of the defendant on this vital issue and he could find nothing in the documents to support Haji Ali's evidence. He found as a fact that the defendant had done no more than tell Haji Ali that he would try to get a loan for the plaintiff, consult his source, explain the availability in principle of the loan and the requirement of a feasibility report, and obtain Haji Ali's agreement to the payment of a 1½ per cent fee for the preparation of such a report by the defendant, subject to the reduction of the fee to ½ per cent if no loan materialised.

The source of finance to which the defendant had referred was a Mr. Visuvasam Innasmuthu ("Visuvasam"). He was a loan broker who operated in Malaysia and Indonesia as well as Brunei. He had principals in Switzerland who could make available loans to finance development projects but the loan had to be made indirectly through the borrower's bank in Brunei which would be able to take a mortgage when funding the project. The problem was evidently not in obtaining agreement in principle for a loan from Visuvasam and his principals, but in finding a Brunei Bank prepared to be the medium for the loan. In this case Visuvasam had the Island Development Bank ("the bank") in mind as the appropriate local bank through which the loan might be effected.

The importance of a loan from the bank through Visuvasam's principals was enhanced by the fact that the bank's loan would be sufficient to cover the cost of the project (estimated at $756,000) whereas the maximum loan obtainable from the EDB was only $500,000. The defendant contemplated that there would be greater delay in obtaining the EDB loan which would be made on more favourable terms than the bank's loan and that by the time the EDB loan materialised it could be used to pay off the bank's loan which would have served its purpose by facilitating the earlier start to the project.

In reliance on the defendant's evidence the Judge found that the feasibility report was not furnished by the defendant until August or September 1985. The defendant's evidence was that while he was preparing the report Visuvasam was out of Brunei. It is hardly surprising that, as the defendant admitted under cross-examination, between May and September 1985, Haji Ali had been chasing him for the loans. However, as the Judge pointed out, there is no claim in the action based on "foot dragging" by the defendant in the preparation of the report.

Matters began to come to a head in September 1985. By late August or early September the defendant had given Visuvasam a copy of the feasibility report to enable him to negotiate the loan with the bank. On 14 September 1985 Haji Ali, acting on the plaintiff's behalf, awarded the construction contract to a contractor who had tendered for $675,000. On that price the defendant's 3½ per cent commission would be $23,625 and his 1½ per cent commission would be $10,120.

From now on the relevant correspondence supplements the oral evidence of Haji Ali and the defendant. By a letter dated 18 September 1985 the defendant requested the plaintiff to execute a power of attorney in order to enable him to process the loan application for the project. The plaintiff complied with this request and executed a power of attorney dated 9 October 1985 in appropriately wide terms.

On 20 September 1985 the defendant sent a letter to the plaintiff regarding fees. It was expressed to confirm a recent oral agreement with Haji Ali regarding the defendant's fee for the feasibility report in the following terms:

> We are pleased to confirm our recent verbal agreement with Haji Ali that our fee for preparing the financial report for the necessary arrangement of a loan is 1½% of total loan amount. This fee is payable in one sum upon the loan being approved. If the loan application fails to materialize for any reason at all we shall bill you only ½% of the amount applied for.

The letter went on to deal with a further fee which was to be payable to Visuvasam who was referred to as the financier. The relevant passage was as follows:

> We wish also to confirm that the financier's service fee is 2½% of loan amount, 1½% of which shall be paid immediately upon the loan being approved by the bank. The remainder shall be paid upon the signing of the loan agreement.

The plaintiff signed the letter, as requested, to acknowledge that he fully understood and accepted its terms.

On 4 October 1985 the plaintiff and Haji Ali had a meeting with the defendant at his office. On the same day the defendant sent a letter to the plaintiff confirming the matters discussed. By para. 1.00 of that letter the plaintiff was advised to make a will to dispose of his land in the manner therein indicated. Paragraph 2.00 referred to the plaintiff's application to the EDB and advised him how to fill in the column in the application form relating to guarantors.

Paragraph 3.00 of the letter was in the following terms:

> That your loan is approved in principle subject to the following being finalised.
>
> 3.01 That a search is being made by the bank in the Land office to ensure that the land is unencumbered.
>
> 3.02 That you sign the power of attorney, a sample copy of which has been given to you to read.
>
> 3.03 You are to agree to pay through us the 2½% financier's service fee upon the receipt of the bank letter stating that the loan for B$750,000 is approved.
>
> 3.04 That you sign the tentative tenancy agreement with Borneo Housing Agency for rental of $2,000 per unit per month.
>
> 3.05 That you agree to pay our fee of 1½% for the preparation of the project feasibility report.
>
> 3.06 When the time comes that you will agree to transfer your fixed deposit to whichever bank is giving you the loan.

On 24 October 1985, at the request of Haji Ali, the defendant accompanied him to the office of the EDB to meet an officer of the EDB who said the project was not feasible according to their assessment of the defendant's feasibility report. The defendant then explained his compound interest formula which the EDB accepted as feasible.

At some stage, according to Haji Ali's evidence under re-examination, the defendant gave him a copy of a letter dated 9 November 1985 in order to satisfy him that the bank had been approached about a loan for the plaintiff. The letter in question was addressed to a Mr. Tuazon, the managing director of the bank. The heading refers to the plaintiff's re-development project. In the body of the letter there is a reference to the "feasibility study" which the defendant is mentioned as having submitted to the bank. There is also a reference

to an enclosed copy of the application form which had been submitted to the EDB for a loan of $500,000. The letter goes on to deal with other matters material to the proposed loan from the bank.

The defendant's evidence was that he kept Haji Ali informed of the state of the negotiations of Visuvasam with the bank and of the difficulties which were being encountered. Haji Ali was evidently highly suspicious at this stage that the defendant was doing nothing. He was approaching a Mr. Suhaili, the bank's training officer, to check on the defendant and Visuvasam's activities. Thus the evidence of Haji Ali was that he had learnt from an officer of the bank that the letter dated 9 November 1985 referred to above had never been received by the bank and that there had been no discussion regarding to project. However, the Judge accepted the defendant's evidence and found that the defendant had in fact taken all necessary steps to try to get the plaintiff a loan through Visuvasam.

In the event the bank never agreed to make the loan sought by Visuvasam for the plaintiff. There were meetings followed by letters and finally the plaintiff determined the defendant's services. On 21 November 1985 there was a meeting at the defendant's office attended by the plaintiff, Haji Ali and the defendant. In a letter of the same date the plaintiff informed the defendant that he was to be given until 30 November 1985 (as allegedly requested by the defendant) to obtain the loan, failing which legal actions would be taken.

Another meeting was held at the defendant's office on 5 December 1985 between the same parties, but this time with Visuvasam in attendance. This meeting was followed by a letter of the same date from the plaintiff in which he purported to record that the defendant had promised "to settle the above mentioned matter" by 12 December 1985 and had also agreed to pay the plaintiff's lost rents with effect from May 1985. Again legal proceedings are threatened in the event of default.

The same parties held a further meeting at the defendant's office on 13 December 1985. This was followed by a letter dated 16 December 1985 from the plaintiff to the defendant in which he recorded the agreement of the parties on the payment of compensation and enclosed what purported to be an estimated claim for $108,000. This was followed on 27 December 1985 by a letter to the defendant from the plaintiff's lawyers terminating the defendant's services on the ground that he had failed to secure the necessary finance for it.

The defendant flatly denied the plaintiff's allegations in the above mentioned letters and dismissed them as fabrications and ridiculous. He further said that he had been willing to carry on with the project at the time his services were terminated. The Judge accepted his evidence on these matters.

The Judge, who had ample opportunity to assess the credibility of Haji Ali and the defendant in the course of their prolonged spells in the witness box, came to the conclusion that Haji Ali was rather unbusinesslike and did not weigh the consequences of his actions. He was held to have taken a chance when evicting the tenants before being sure of the finance for the new development. The Judge concluded that he, being an adult who is expected to act reasonably must accept the consequences of his own actions. As the Judge put it - "he cannot expect others to save him from his own folly".

On the other hand the impression which the Judge was given of the defendant was that he was "an extremely cautious and sensible man." The Judge was left in no doubt that although the defendant had signed the notices to quit he had, as he alleged, tried to restrain Haji Ali from rushing ahead and evicting the plaintiff's tenants. He had the Judge held, acted on Haji Ali's instructions.

Furthermore the Judge considered that it was virtually inconceivable that anyone performing the role of an architect would promise to ensure that a loan was furnished. This is strong language but, as so often happens with the Judge in question, it is rich in common sense. The Judge accepted that a party would make such an unusual contract but rightly held that it would require to be established by clear evidence.

Rhind J pointed out that there was no support to be found for the plaintiff in the documents. On the contrary the letter dated 20 September 1985 expressly stipulates for the payment of a fee of ½ per cent of the development cost if no loan materialised. The plaintiff endorsed this letter to signify his acceptance of its terms.

As to the allegations and claims contained in the plaintiff's letters dated 21 November, 5 December and 16 December 1985, the Judge had no difficulty in rejecting them as being self-serving documents or minimal evidential value. In my Judgement he was fully entitled to accept the defendant's reasons for ignoring these letters and to hold that in all the circumstances it was contrary to all common sense to imagine that the defendant would ever have agreed to pay the plaintiff the sum of $36,000 lost rental plus $1,800 for unpaid water and electricity bills.

The grounds of appeal and argument in support which seek to challenge these findings of fact are in my judgment not persuasive and seem to be substantially a rehearsal of the arguments advanced at the trial.

Accepting as the Judge did, that it is possible that a person in the defendant's position and performing the role of an architect might be so ill-advised as to, in effect, guarantee that a bank or other financial body will lend $756,000 or $675,000 to his client who appears to have no security other than his land, I fail to comprehend how any of the 10 matters relied upon in ground 2 of the plaintiff's grounds of appeal (which is really linked with ground 1) can be relied upon to establish that the Judge's decision was against the weight of the evidence.

Moreover the allegation that the defendant had consistently represented to the plaintiff in the correspondence that he would obtain the loan is simply not borne out by the terms of that correspondence to which we were referred.

Furthermore, as the Judge rightly held, the fact that the defendant's fee was to be reduced to ½ per cent from 1½ per cent if the loan did not materialise, confirms the defendant's evidence if and so far as such confirmation can be said to be necessary, when the Judge believed him.

I accept that the Judge misapprehended Haji Ali's evidence when he held that Haji Ali had applied to the EDB in February 1985 for a loan. I have dealt with that already. However, for my part, I do not consider that the basis of the Judge's decision on the credibility of the witnesses is in any way affected by his slip on this point.

Then there is the ground that the Judge wrongly inferred that as a matter of common sense the feasibility report (which was not produced at the trial or shown to the plaintiff) showed how the projected rental from the new development would be sufficient to service the loans being sought by the plaintiff.

Assuming, without deciding, that this ground is sound I fail to see how it affects the decision of the Judge on the plaintiff's claim where no allegation is made regarding the efficacy of the content of the report which on the defendant's unchallenged evidence proved to be sufficient, when explained by the defendant on 24 October 1985, to persuade the EDB officer that the plaintiff's project was viable.

It is contended that the Judge should have found that because he concluded that the mechanics of the loan were somewhat complicated and because Haji Ali was a civil servant, he would be less able to appreciate the complexity of the loan mechanics compared to the more experienced and professional defendant. On this basis it is further contended that the Judge should have preferred Haji Ali's evidence to that of the defendant.

Such an argument, if accepted, bodes ill for the professional man who is honest and truthful and finds himself faced with a wholly ill-founded claim by a client who has deluded himself into believing that his professional agent has entered into a legally binding commitment in circumstances in which no reasonable man would so delude himself.

In my judgment this argument is wholly unreasonable and illogical and I reject it.

A further ground seeks to attack the Judge's acceptance of the defendant's evidence because it is contended that instead of relying on inherent improbability, common experience and common sense the Judge should have been more influenced by certain aspects of the defendant's conduct.

Four matters were relied on. They are his conduct and behaviour such as:

(a) that reflected in his letters dated 20 September 1985, 4 October 1985 and 9 November 1985;

(b) his emphasis on the need for feasibility report and his retaining such report obviously for his own use;

(c) his obtaining the irrevocable Power of Attorney from the appellant drafted by him with specific powers which obviously meet his needs;

(d) his contact and alleged negotiations with Mr. Visuvasam and the Bank to the exclusion of the appellant;

(e) his receipt dated 18 May 1985 for $10,000 being "processing fee for loan".

It seems to me that all these matters are wholly consistent with the defendant's evidence that he undertook to assist the plaintiff to apply for a loan and to produced a feasibility report to support the application and nothing more. None of the matters mentioned in any way render the agreement alleged by the plaintiff any less improbable.

It was contended that in the absence of any expert evidence the Judge was wrong in accepting the defendant's evidence that the failure to obtain the bank loan was due to the "downturn in the local economy which was noticeable by September or October 1985" and to doubts whether the units could fetch "the level of rents projected in the feasibility study".

The actual evidence of the defendant on this matter was as follows:

> At first Mr. Visuvasam told me the manager was happy, but because of economic down-trend, he doubted whether flats, when completed, would fetch the rents expected in order to recover the payment of the loan.

My understanding of that evidence is that it is a narrative of what Visuvasam told the defendant as being the reason why the manager of the bank was making difficulties about the loan.

Furthermore my understanding of the treatment of this evidence by the Judge at p. 19 of the appeal record is that he was simply regarding it as evidence of a "further complication" in the way of the proposed loans and was not intending to make a finding of fact regarding the actual economic situation in Brunei at the material time.

The relevant passages quoted in the grounds of appeal from the judgment are gobbits extracted from the entire paragraph. Read as a whole the paragraph is, in my judgment unobjectionable.

It is contended that the Judge was wrong in not attaching weight to the agreement to pay compensation alleged in the plaintiff's letter dated 16 December 1985. It is asserted that this letter did not merely contain an assumption of the agreement alleged but was sent following and confirming the discussion which was held between the parties.

It is further contended that having found the defendant to be "an extremely cautious and sensible man" the Judge should have, in effect, discredited the defendant for not replying to the letter and denying its allegations.

The central question underlying this and other letters is whether or not the defendant agreed what he is alleged to have agreed. No amount of self-serving letters can give rise to an agreement if it was never made. The Judge has so held after finding the defendant to be a credible witness. I contend myself with adding only that I entirely agree with his reasoning and I consider that he was fully entitled to come to the decision he did on the defendant's credibility. It is not for this Court to disturb such a finding made in the circumstances of this case.

Finally regarding the dismissal of the plaintiff's claim it is contended that the Judge's finding that Haji Ali was unbusinesslike shows that he is inexperienced in the relevant matters and therefore had to rely wholly on the defendant's expertise.

I agree, but this does not mean that he is entitled to burden the defendant with a very onerous obligation to, in effect, guarantee finance to the plaintiff simply because he has persuaded himself that the defendant has agreed to accept such an obligation. The law cannot lend itself to create obligations for such manifestly unreasonable reasons.

In my judgment there are no grounds for disturbing the Judge's decision to dismiss the plaintiff's claim.

As regards to defendant's counterclaim, two matters were raise concerning quantum.

The Judge allowed the defendant's counterclaim for his 1½ per cent fee in respect of the feasibility report. He gave the following reasons for his decision:

> Further, the plaintiff must pay the defendant 1½% on the $500,000 loan he got from EDB. The defendant submitted his feasibility report to EDB on the plaintiff's behalf and also accompanied PW2 to the EDB office to explain that feasibility report. Common sense indicates that the defendant's assistance to the plaintiff must have played a part of EDB agreeing to grant the loan for this project, so that the defendant has earned his commission now that the loan has been successful.

The defendant now adopt this reasoning.

For the plaintiff it is contended that this finding is inconsistent with the evidence of the defendant which the Judge had accepted. The defendant's evidence in chief had been that when he mentioned Visuvasam as a possible source of finance he had told Haji Ali that if he wanted to get finance from someone like that or from banks it was necessary to have a feasibility report to show that the project was viable. Under cross-examination he asserted the Visuvasam had required the report to substantiate the application. Later in his cross-examination he said that the bank had required the report. He then added that he had given a copy of the report to EDB because they requested it to evaluate the viability of the project.

It seems clear therefore, that on his own evidence the defendant had actually contracted to prepare the feasibility report to support the application for a loan to the bank and that the different fees agreed for the report by reference to the success or failure of the application related to the bank loan only. This is confirmed by the documents. The defendant's letter dated 20 September 1985 refers generally to the fee for "a loan" in the first paragraph but in the second paragraph the word "loan" can only be referable to the proposed loan from the bank because it was concerned with Visuvasam's fee and contemplates only approval of the loan by the bank. Furthermore the defendant's letter dated 4 October 1985 is clearly referring in para. 3 to the bank loan only, and in para. 3.05 the defendant inserted the condition:

> That you agree to pay our fee of 1½% for the preparation of he project of the feasibility report.

The Judge based his decision on the fact that the report had in fact been submitted to the EDB and must have played a part in the EDB granting the loan. However, for my part, I accept the contention of the plaintiff's Counsel that the amount of the fee which the plaintiff was contractually bound to pay for the report depended on whether or not the bank loan materialised.

I would therefore allow the appeal on this point and reduce the amount recoverable by the defendant on the counterclaim from $7,500 to $3,373.33.

A further ground of appeal raised the contention that the Judge was wrong in failing to deduct from the amount recoverable by the defendant under the counterclaim the sum of $10,000 which the plaintiff had paid to Visuvasam as an advance payment of his 2½ per cent financier's fee.

This payment had fact been made to the defendant who issued a receipt in respect of it to the defendant dated 21 October 1985. The receipt was expressed to be in respect of the payment of "Processing Fee for Loan". The defendant's letter dated 20 September 1985 makes it clear that Visuvasam's fee was only payable, as to 1½ per cent, upon the loan being approved by the bank and, as to the remainder, upon the signing of the loan agreement.

The defendant's evidence on this matter, which the Judge must have accepted was to the effect that Visuvasam wanted the $10,000 as a deposit to cover his expenses of communicating with his Zurich office. He wanted the money on the basis that it would be refundable if the loan did not materialise. The defendant said that he told Haji Ali about this. He said that he received the money in cash and immediately gave Visuvasam a cheque for the same amount which a friend cashed. The defendant produced the cheque. Under cross-examination he insisted that he had told the plaintiff that the money was a deposit towards Visuvasam's fee.

On that evidence, which the Judge accepted, the established facts were that the defendant had received the $10,000 from the plaintiff as the agent for his principal Visuvasam and had so informed the plaintiff when the money was paid. The money was paid by the defendant to Visuvasam. As a matter of law the money is therefore recoverable by the plaintiff from Visuvasam and not from the defendant: *Bowstead on Agency*, 15th Edn., Article 75 and 118, *Halsbury's Laws of England*, 4th Edn., Vol. I, para. 859.

Accordingly I would dismiss the appeal against the Judge's order dismissing the plaintiff's claim but I would allow the appeal against the judgment on the defendant's counterclaim to the extent only of reducing the amount of the judgment by $5,000 from $21,125 to $16,125.

ADDENDUM

The Court of Appeal observed after delivering oral judgment in Court that the figure representing the commission of ½% referred to therein was incorrect and should have produced a figure of $3,375. Under the slip rule this figure will be amended and the final figure for judgment should be adjusted and inserted in the perfected order. Both parties had been requested to attend before the Court but the respondent who obtains the benefit of this adjustment was not present. Subsequently his son appeared and the amended figures were explained.

Also found at [1988] 2 CLJ 559